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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.

PEARL E. THOMAS, ADMINISTRATRIX OF THE ESTATE OF CLYDE R. THOMAS, deceased, *Petitioner,*

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above cause (6435) on September 3, 1952, reported officially in 198 F. 2d 783, reversing the judgment of the United States District Court for the Eastern District of Virginia and remanding the cause for a new trial. (R. 71)

I. JURISDICTION

The jurisdiction of this Court is founded on Title 28, United States Code, "Judiciary and Judicial Procedure", Sec. 1254(1):

II. STATUTE INVOLVED

This case involves Title 45, United States Code, "Federal Employers' Liability Act", Sec. 51:

> "*Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence, definition of employees.* Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. • • •" (Act of April 22, 1908, ch. 149, § 1, 35 Stat. 65; amended August 11, 1939, ch. 685, § 1, 53 Stat. 1404; 45 United States Code § 51).

III. QUESTION PRESENTED

The question presented is:

1. Did the Court of Appeals err in reversing the judgment of the trial court, for submitting to the jury, the issue of whether the Respondent negligently failed in its duty to exercise reasonable care in this movement and operation

of its train, so as to provide in a reasonable manner for the safety of its employees, and, if so, whether such failure was the proximate cause, in whole or in part, of the decedent's death.

IV. SUMMARY STATEMENT OF MATTER INVOLVED

The Petitioner, on behalf of herself as surviving widow and one adult son, sued the Respondent in the United States District Court for the Eastern District of Virginia, under Title 45, United States Code, "Federal Employers' Liability Act," Sec. 51-60, to recover damages for the death of her husband, who was employed by the Respondent as a brakeman.

While in the course of his duties, the decedent was riding on the side of a box car, which was one of two being pushed into the Respondent's siding, when the top of the car, on which he was riding, came into contact with the short vertical nipple on the end of the horizontal part of an iron standpipe, located adjacent to the tracks and used for unloading gasoline. The pipe broke into several pieces—one of which struck the decedent on the head and caused his death. At the time of the accident, the horizontal part of the standpipe was not in its customary position, parallel to the tracks, when not in use, but was fouling the track at a slight angle.

The Petitioner's suit alleged the failure of the Respondent to provide the decedent with a safe place in which to work, and, an unsafe train operation. A third party complaint was filed by the Respondent against the Southern Oil Stores, Incorporated, user of the standpipe, but the District Court ordered a separate trial on the issues involved in that action.

From a judgment of the United States District Court, pursuant to a jury verdict awarding damages to the Petitioner in the amount of $25,000.00 (R. 62) an appeal was taken, by the Respondent, to the United States Court of Appeals for the Fourth Circuit, which reversed the judg-

ment on the ground they could find nothing which could support a reasonable inference that negligence, if any, in the performance of its duty to exercise reasonable care in this movement and operation so as to provide in a reasonable manner for the safety of its employees, was the proximate cause in whole or in part of the decedent's injuries. (R. 69) Even though there was sufficient evidence of an unsafe place in which to work, since the verdict was general, they remanded the case for a new trial (a two to one opinion—PAUL, District Judge, writing a dissent).

V. REASON FOR ALLOWANCE OF WRIT

1. The opinion of the Court of Appeals for the Fourth Circuit is in conflict with the opinion of this Court in the cases of

Bailey v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062 (1943);
Ellis v. *Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598 (1947);
Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946);
Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944);
Tiller v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421 (1945); and,
Wilkerson v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949).

Such a conflict can only be resolved by a decision of this Court and should be resolved in order to bring about uniformity in federal rights granted by a federal act.

WHEREFORE, the Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

BERNARD M. SAVAGE
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Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.

PEARL E. THOMAS, ADMINISTRATRIX OF THE ESTATE OF CLYDE R. THOMAS, deceased, *Petitioner,*

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is officially reported in 198 F. 2d 783.

II. JURISDICTION OF COURT

The jurisdiction of this Court is invoked under Title 28, United States Code, "Judiciary and Judicial Procedure", Sec. 1254(1).

III. STATEMENT OF THE CASE

Clyde R. Thomas, the decedent, was employed by the Respondent as a brakeman, and, on August 29, 1949, was one of a five-man crew consisting of Conductor Irby, Fireman Brewer, Engineer Hudson, and Brakeman McCravy. On

NOTE: Those excerpts of the testimony in the Statement of the Case and subsequent Argument, signified by use of the letter (T.), refer directly to the certified transcript of the testimony from the trial court and were included in the Petitioner's brief on appeal—the Petitioner having had no Appendix.

the particular move, resulting in Thomas' death, it was intended to place two "order-notify"[1] box cars (R. 1) (each car 44 feet in length, overall (R. 5)) on the 33rd Street Siding at Newport News, Virginia, which siding served the Southern Oil Stores Company and five other consignees (T. 147) and therefore was not a private siding as claimed. On this move, there was a contact between the standpipe (also referred to as unloading rack), which was in the shape of an inverted "L" (as shown by Respondent's Exhibit No. 4, (T. 90), serving the Southern Oil Stores Company, and, the top of the leading box car, causing the standpipe to break into several pieces—one of which struck the decedent on the head, causing his death.

The Respondent's engine, which was headed east and being operated by Brewer, the fireman, was pulling the two box cars in a westerly direction by the 33rd Street Siding switch, when Brakeman McCravy gave Fireman Brewer a stop signal (R. 6). McCravy then threw the switch to permit the cars and engine to be shoved eastward to enter the siding. This switch was 180 feet from the standpipe. At this time, Thomas, the decedent, was riding on the bottom rung of the ladder, which was three feet above the ground (R. 19), on the leading end of the leading car (R. 6, 7). After McCravy threw the switch for the siding, both he and Thomas gave Brewer a "come ahead" signal (R. 21). Brewer saw the signal of both men and moved slowly ahead, with the engine headed against the cars, but, because of the curvature of the track, Thomas passed out of his line of vision (R. 22); nevertheless, Brewer, seeing no one, continued to shove ahead. McCravy remained at a point in line with the switch, even though the engine passed him. (His claim that he could see part of Thomas' body at the time of the accident (R. 30), is disputed for the reasons hereinafter set forth). As the two cars continued to be pushed easterly, with Thomas still

[1] "Order-notify" means that the cars were not to be "spotted" at any particular place, but were to be left subject to further orders.

riding the first rung of the ladder, the vertical nipple on the end of the nine foot horizontal part of the standpipe, came into contact with the top of the box car, at a point about 6 inches from the side on which Thomas was riding (R. 16), causing the pipe to break into several pieces, fall and strike Thomas, and leaving a semi-circular indentation at the point of contact on top of the car. Thomas was knocked off the box car by the falling pieces of broken pipe, and fell against a wire fence (R. 9). Brewer, operating the engine, saw no part of the accident—Thomas had passed out of his sight because of the track curvature and over-hang of the cars. He was looking ahead in the direction of the movement and heard McCravy holler from behind him (R. 21), turned around, and applied the brakes.

The standpipe was located between Respondent's track and the fence of the Peninsula Lumber Company (R. 20), and not between Respondent's track and the Southern Oil Stores Company property, as claimed by the Respondent. A pipe led underground from this standpipe into the storage tanks of the Southern Oil Stores Company some distance away. At no time during the course of the trial did the Respondent deny ownership of the right-of-way on which this standpipe was located.

When the standpipe was not in use, the horizontal part was intended to be parallel with the siding track. When it was in use for unloading the contents of tank cars, the horizontal part was swung out across the tracks at a right angle, and a downspout was put into the center of the tank car and screwed on to the nipple. The movement from the point parallel to the siding track to the right angle position was made possible by a ball and/or swivel joint (R. 39), as shown on Respondent's Exhibit No. 4 (T. 90). Although a chain to secure the pipe had been used before and after the accident (T. 165, 176), there was no device on the standpipe at the time of the accident (T. 135) to prevent its unintended movement or to prevent it from fouling the track when not in use.

On the 18th day of December, 1949, the Petitioner, a resident of Virginia, brought suit against the Respondent, a Virginia Corporation, in the United States District Court for the Eastern District of Virginia, under Title 45, United States Code, "Federal Employers' Liability Act", Sec. 51-60, to recover damages for the death of the fifty year old decedent on August 29, 1949. The Complaint alleged that the accident and resulting death of Thomas was caused by the negligence of the Respondent, its agents and employees in the premises in:

(a) Failing to use reasonable care to give the decedent a safe place in which to work, in that said standpipe at the time of the accident and for a long time prior thereto had no device by which it could be secured in position to prevent it from fouling said track.

(b) Failing to bring said train movement to an immediate stop, when the decedent passed from the sight of those members of the Respondent's crew, charged with the duty of keeping the decedent in view.

From a judgment of the District Court pursuant to a jury verdict of $25,000.00, the Respondent appealed to the United States Court of Appeals for the Fourth Circuit, which stated (R. 65):

> "This appeal concerns the correctness of the District Court's submission to the jury of three questions:
>
> (1) The question whether the defendant had exercised ordinary care to provide a reasonably safe place for the plaintiff's decedent to work;
>
> (2) The issue of contributory negligence; and
>
> (3) The question whether the defendant was negligent in the movement or operation of its train."

The Court of Appeals held that the first two questions were properly submitted, but as to the question of the movement and operation of the train, said (R. 69):

> " * * * We cannot find anything which could support a reasonable inference that negligence, if any, in the performance of such a duty was the proximate cause in whole or in part of the decedent's injuries."

That since the jury could have based its finding of negligence on this ground, it being a general verdict, the instruction as to this question was prejudicial to the Respondent (R. 70), and remanded the case for a new trial (a two to one opinion—PAUL, District Judge, dissenting).

IV. SPECIFICATION OF ERRORS

The Petitioner respectfully submits that the United State Court of Appeals for the Fourth Circuit was in error:

In reversing the judgment of the trial court, on the ground they could find nothing which could support a reasonable inference that negligence, if any, in the performance of the duty of the Respondent to exercise reasonable care in this movement and operation, was the proximate cause in whole or in part of the decedent's injuries.

V. SUMMARY OF ARGUMENT

A. The admission of Fireman Brewer, operating the engine, that he failed to stop his train even when the two employees, Brakemen McCravy and Thomas, who were controlling the train movement by hand signals, disappeared from sight, resulting in a blind movement, is clear evidence of negligent train operation.

B. From the evidence, the Jury could have reasonably inferred that Fireman Brewer might have avoided the accident, had he stopped the train when Thomas disappeared from sight, or, that Brakeman McCravy might have seen the horizontal part of the standpipe fouling the track in time to have stopped the movement, had he been in his normal position to relay signals.

C. There is a presumption that Thomas, the decedent, was engaged in the performance of his duties and was exercising due care and caution for his safety. The Appellate Court erred in confining this presumption to the issue of whether the decedent was guilty of negligence, which was the sole cause of the accident. The Jury was entitled to consider this presumption, in determining whether Brakeman McCravy's negligence, in failing to be in his proper position to relay signals, proximately caused or contributed in whole or in part to the happening of the accident.

VI. ARGUMENT

A. The Evidence Required Submission to the Jury the Issue of Negligence of Respondent in Movement or Operation of Its Train.

The following facts, in addition to those set forth in the Statement of the Case, as to negligent train movement, have been proven beyond dispute:

1. Thomas, the decedent, was riding on the bottom rung of the ladder on the leading end of the first box-car, where his duties required him to be.

2. The nipple of the horizontal portion of the standpipe, which extended across the track at a slight angle, came into contact with the top of the box-car on which the decedent was riding, about six inches from the side, and broke into several pieces—one of which struck the decedent on the head, causing his death.

3. Neither Brewer nor McCravy saw the horizontal part of the standpipe break off after its contact with the first box car—McCravy's first knowledge of the contact being when he saw the vertical portion of the standpipe vibrate (R. 9).

4. Brewer, operating the engine, was ahead and thirty or more feet east of McCravy (R. 13), who remained at the

switch, and the engine was moving East and further away from McCravy when the accident occurred, so that McCravy had to shout above the noise of the engine to Brewer, to stop.

5. Brewer was looking straight ahead, in the direction which he was moving, and was not expecting a signal from anyone behind him (R. 24). At the time of the accident, he could see no one—Thomas having passed from his line of vision and McCravy being behind him (R. 21, 22). He admitted that if there had been some obstruction and Thomas had given a stop signal, he, Brewer, would not have seen it (T. 46). He admitted further, that the rules required Thomas to take a conspicuous place on the leading car (T. 46). It is a standard practice when relaying signals to be between the engineer and the man that is giving them (R. 23).

6. McCravy said that ordinarily when you relay signals, you are in a position between the engineer and the man giving signals, and would be required to be in the engineer's line of vision (R. 14). He offered no explanation of why he did not comply with the ordinary procedure. He said it was his duty to stay in sight of Thomas, which the company required, in order that he could communicate signals and see what is going on (T. 66).

7. McCravy, who remained at the switch, said he could only see part of Thomas' body; that the engine was moving away from him at three miles per hour; that he stepped back two or three steps in the direction of a waist-high ditch that was immediately behind him (T. 63).

Brakeman McCravy testified (R. 11):

* * * * * * * * *

"A. Well, it is the general practice to stay in sight of a man you are working with. If he got out of my sight, I would have made the engineer stop.

"Q. You would signal the engineer to stop. Why?

A. Well, it doesn't make sense to go shoving around and you don't see anybody."

• • • • • • • • • •

This would seem a reasonably accurate appraisal of Brewer's conduct in shoving ahead blindly when he could see no one.

At (R. 11) McCravy said he could not see all of Thomas' body because of the curvature of the track.

At (R. 13) he said the engineer had passed him; that he was thirty feet from him; that he had to shout to attract his attention because the engineer was looking ahead. At (R. 13, 14):

• • • • • • • • • •

"Q. Ordinarily, when you relay signals, you are in what position between the engineer and the man giving signals? A. Ordinarily, yes, sir.

Q. That is a question. You are ordinarily between the engineer and the man giving the signals; is that correct? A. Ordinarily, you are, yes.

Q. Why? A. *Well, I am there to receive a signal from the man on the head end and relay it to the engineer.*

Q. *So it would be required that you be in the engineer's line of vision?* A. *That's right.*

• • • • • • • • • •

At (R. 33), he answered:

• • • • • • • • • •

"Q. Why did you want to keep Mr. Thomas in sight? A. It was my duty—force of habit, more than anything else."

• • • • • • • • • •

At T. 66, he answered:

"Q. Why was it your duty? A. I considered it my duty to keep in sight of the man in front of me as much as ——

Q. I am sorry we can't hear you. A. Well, it is my duty to stay in sight of him. That is my duty. The

company requires me to stay in sight of a man, *to communicate signals and see what is going on.*"

• • • • • • • • • •

At (R. 34), he replied:

• • • • • • • • • •

"Q. And in this case the only person you could transmit signals to was the engineer, is that right? A. Yes, that's right.

Q. And you were in back of him. A. At the time that this accident occurred."

• • • • • • • • • •

At (R. 34, 35), he answered:

• • • • • • • • • •

"A. I was at the back of the engineer.

Q. And the engineer was looking straight ahead? A. Yes, sir.

Q. So that you had to shout to him? A. I shouted to him—called his attention.

• • • • • • • • • •

Q. And you had to raise your voice over what noise there was? A. Yes, sir.

Q. Ordinarily when you transmit signals, don't you get between the engineer and the man giving the signal? A. Yes, sir."

• • • • • • • • • •

The admitted rule that the man on the leading car take a conspicuous place means conspicuous to other crew members, for the obvious purpose of relaying any signal given by the man on the leading car, or doing something if this man disappears from sight. Shouting above the noise of a steam engine could hardly be construed as relaying a signal. In fact, the engineer was not expecting a signal from McCravy, because the engineer was looking East and he would only expect a signal from someone East of him (R. 24). McCravy never explained why he did not move East with the movement of the engine, so that he could be *between* Thomas and Brewer, which he said was the place he ordinarily would have been (R. 13). He never said

why this was a situation out of the ordinary. The fact that he was not in the position he ordinarily would have been, permitted, if not compelled, an inference that he was negligent in not performing his duties in the usual and customary manner.

Fireman Brewer was negligent in shoving ahead blindly. The rule (T. 45) requiring a man on the leading car to take a conspicious place, means a place where he could be seen by someone at all times, and, this means that when Thomas passed from Brewer's line of vision, Brewer should have stopped the engine immediately, unless Brewer was then looking at someone between Thomas and himself. He admittedly was not, because McCravy was behind him. To continue to move ahead under such circumstances, knowing that Thomas and McCravy had originally given the signal starting the movement and Thomas would give a stop signal where he desired the cars to be placed, or when an obstruction appeared, was *gross negligence*. He said (R. 21, 22):

* * * * * * * * * *

"Q. Well, you got a come ahead signal from Mr. Thomas as you were shoving the two cars in there, is that right? A. Mr. McCravy, both gave me a forward signal.

Q. As you were shoving in, did Mr. McCravy remain at the switch? A. He did.

Q. Why did you stop? A. Mr. McCravy hollered at me and told me to stop—hollered at me, and, as I turned my head, I made an application of the brake valve and stopped, all the same time that I looked around.

Q. You were looking ahead first? A. Yes, sir.

Q. And when he shouted to you, you turned around? A. And shut the throttle off and made an application of the brake valve at the same time.

Q. All at the same time? A. Yes, sir, just as fast as I could.

Q. And you stopped in what distance after McCravy shouted to you? A. About half a car length.

Q. Mr. McCravy was how far back of you? A. Oh, 300 feet [this may have been an error, 30 feet was

probably intended] something like that; just a little way back; I don't know—not too far back.[1]

Q. At the time Mr. McCravy shouted to you, could you see Mr. Thomas? A. I could not.

Q. Why? A. There is a little curve in the track there that throwed me off for a second or two. I couldn't see him. You can't see a man when he is on two cars there, for just a little ways.

Q. For what distance? A. I don't know exactly how far. It is just a few feet, I don't know—just a little ways, you can't see a man there.

Q. At what speed were you shoving in there? A. About 3 miles an hour.

Q. And at that speed he would be out of your sight for a few seconds? A. Just a few seconds, yes.

• • • • • • • • •

Q. So you could not see the pipe strike him? A. No, sir.

Q. And you did not see the standpipe at the time, did you? A. No, sir.

• • • • • • • • • •

(R. 23):

"Q. As you were shoving in there, were you looking straight ahead? A. Yes, sir.

Q. But you could not see Mr. Thomas? A. I saw Mr. Thomas when he started in there, but when he got up here so far, he got out of my sight on account of that curve.

Q. So that the only way you could get a signal would be for McCravy to shout to you? A. Well, at that minute, yes, I guess so.

Q. Normally, when a man is relaying signals, he is between you and the man giving signals, isn't he? A. That depends. If I could see the man, that depends on what kind of signals you are looking for, where your position calls for you to be. It all depends.

---

[1] McCravy, at the switch, was 180 feet from the vertical part of the standpipe. The horizontal arm, 9 feet long, was at a slight angle to the track when it contacted the car (T. 105, 106)—and this, added to the 180 feet, would mean a distance of about 189 feet between Thomas, who was on the end of the car, and McCravy. The engineer was 140 feet (R. 12) away from Thomas, which deducted from 189 feet, would leave 49 feet as the distance Brewer had passed, when McCravy shouted to him to stop.

Q. Mr. Brewer, hasn't it been the standard practice on the C. & O. Railroad and the B. & O. Railroad for whom you worked, that when a man is relaying signals, he has to be between you and the man that is giving them? A. I understand what you are talking about now. Yes, in front of me, or back of me, whichever way we are moving.

Q. If you are moving east, he is supposed to be east of you relaying signals, is that correct?'''

• • • • • • • • • •

(R. 24):

• • • • • • • • • •

"A. If you are moving east, you are looking east to a signal—is that what you mean?

Q. (Mr. Savage) That is right. A. That is what I am doing. If I am moving west, I am looking west for a signal.

Q. And ordinarily, if you are moving east, you would not expect a signal west of you, would you? A. A man running is always looking the way he is going, looking for a signal at all times.

Q. Looking for a signal the way you are going? A. Yes, sir, at all times."

• • • • • • • • • •

(T. 46):

"Q. Tell us why you did not stop when he disappeared from sight? A. It has been customary to shove those cars in there all the time. You are just going to shove them in a little ways—I knew that, and leave them, and I knew I would see him shortly."

• • • • • • • • • •

"Q. So that had Mr. Thomas seen any obstruction and given you a signal, you would not have seen it? A. I guess not, not where he was, as I told you."

B. Unsafe Train Movement is Conclusively Proved by the Testimony of Fireman Brewer and Brakeman McCravy.

Brewer, who was operating the engine, admitted that he was shoving ahead blindly; that Thomas was out of his sight for a few seconds; that had Thomas given a signal

at that time, he, Brewer, would not have seen it; that he could see no one from whom he could receive a signal; that he was not expecting a signal from anyone behind him. This, together with the Respondent's statement that Thomas was on the leading car for the purpose of giving signals, places the negligence of Brewer beyond dispute.

McCravy, by remaining at the switch, even though he testified (R. 13) that in the ordinary course of relaying signals and in the normal manner, he would have been between Brewer and Thomas, without explanation as to why he was not in his proper position and would thereby be in the sight of both in order *to communicate signals and see what is going on* (T. 66), in effect, admits his negligence. He was the only one who says he saw Thomas immediately preceding the accident, and said he only saw about half of Thomas' body (R. 30):

* * * * * * * * *

"A. Well, right up to the point of the accident I could see his whole body, but just at the point of the accident his body was gradually moving out of sight. I would say that I could see about—oh, I would say about half of his body was perfectly visible, not more than that, from me.

* * * * * * * * *

McCravy testified that in order for Thomas to have given a signal, he, Thomas, would have had to put his arm out to give a signal and that would put his arm several feet beyond his body and he, McCravy, could have seen it (R. 30); but this overlooks the fact that there was only a narrow clearance [1] between the side of the car Thomas had been on and the vertical part of the standpipe; thus, Thomas could not have given his signal by extending his arm toward the

[1] Respondent's Exhibit No. 4 (T. 90) shows 9 feet from the vertical part of the standpipe to the center of the rails. The rails are 4 feet 8½ inches apart (T. 127)—one half of this deducted from 9 feet would leave 6 feet 7¾ inches. The testimony is that a box car is approximately 10 feet wide (R. 12), which would mean about a 2½ foot overhang on each side. This would further reduce the clearance to 4 feet 1¾ inches. From this, must be deducted the width of the ladders on the side of the car and the width of a man's body.

standpipe, but would have had to put his hand upward, and this, the Jury could have readily found was the part of Thomas' body that McCravy did not see. The Jury could have concluded from his testimony, that any man who stands behind a steam engine which discharges smoke and steam, through which he would have to see in order to keep the decedent, 180 feet away, in sight, and, at the same time was moving back one, two or three steps, he wasn't sure (R. 32) but had to be careful that he didn't fall into a ditch behind him, which would have happened if he took four steps (T. 63), and who, because of the curve in the track (R. 18) did not see the part of the two and one-half inch pipe, nine feet long, above the head of the decedent, which came into contact with the car, break off and strike Thomas on the head, but whose first knowledge of the accident was when he saw the vertical part of the standpipe vibrate (R. 17), and who had to shout stop to the engineer 30 feet ahead who was not expecting or looking for a signal, and who admitted that he was not where he normally would have been to relay signals, is mistaken when he testified that he could have seen Thomas' hand had he given a signal. Even if his testimony was credible and was uncontroverted, the Jury could still have seen fit to disbelieve it. In the case of *Quock Ting* v. *United States*, 140 U. S. 417, 35 L. Ed. 501 (1891), this Court said:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of this court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. * * *"

In the case of *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946), this Court said:

> "* * * But where * * * there is an evidentiary basis for the jury's verdict, the jury is free to discard or

disbelieve whatever facts are inconsistent with its conclusion. * * *"

See also *Ellis* v. *Union Pac. Ry. Co.*, 329 U. S. 649, 67 S. Ct. 598 (1947).

C. There is a Presumption that the Decedent was Engaged in the Performance of His Duties and Exercised Due Care and Caution for His Safety.

The undisputed and positive statement that Thomas was where he was supposed to be in the performance of his duties, gives rise to the presumption that while in the performance of his duties, he observed the standpipe fouling the track and gave a stop signal. In the case of *Tennant* v. *Peoria Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944), wherein Tennant's body was found where his duties would normally require him to be, at the point where the engine began its backward movement, and in which there were no eyewitnesses, this Court said (P. 34):

"* * * To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303; Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U. S. 356, 50 S. Ct. 283; New Aetna Portland Cement Co. v. Hatti, 231 F. 611."

See also *Stanford* v. *Pennsylvania R. Co.*, 171 F. 2d 632 (1948).

In the instant case, it is not necessary to carry the presumption as far as this Court did in the *Tennant* case, *supra*, but, that if, by the exercise of reasonable care, Thomas should have observed the standpipe fouling the track, it is presumed he gave the signal.

Thus, the Jury could have reasonably inferred any of the following:

1. Thomas saw the horizontal part of the standpipe fouling the track and gave a stop signal which was not seen by either Brewer nor McCravy.

2. Thomas gave a stop signal which was seen by McCravy too late to have avoided the accident, because McCravy was not in his normal position to relay a signal.

3. If Brewer had stopped the train when Thomas disappeared from sight, the accident would have been avoided.

4. Thomas did not see the horizontal part of the standpipe fouling the track;[1] but had McCravy been where he ordinarily would have been to relay signals and see what is going on (T. 66), he would have seen it and could have stopped Brewer immediately instead of shouting from behind him.[2]

The Appellate Court based its reversal squarely on the view that Thomas gave no stop signal. Regardless of whether or not he gave a signal, the probability, that the accident would have been avoided had Brewer stopped when Thomas disappeared from sight, or, had McCravy been in his normal position to relay signals, he would have seen the pipe in time to have stopped the movement before contact, was not considered in the Court's opinion.

D. The Negligence of the Respondent Was the Proximate Cause in Whole or in Part of the Decedent's Death.

Had the jury found or reasonably inferred that any of the factual situations, as enumerated in the preceding argument (C), it could not be seriously contended that said happenings did not contribute in whole or in part to Thomas' death.

---

1 The Court of Appeals recognized (R. 68) that Thomas' primary attention was probably directed at seeing that the siding track was clear of chocking blocks that might derail the cars.

2 Brewer and Thomas were 140 feet apart (R. 12). From a midway position, 70 feet from the pipe, McCravy would have had it in his direct line of vision (T. 104), and, being in the direct line of Brewer's vision, could have immediately given a stop signal to Brewer, who, while moving ahead at only 3 miles per hour, could have stopped the train instantly, instead of a half a car length in which it took him to stop after hearing McCravy's shouts from behind him.

The Court of Appeals, in reversing the trial court for permitting the case to go to the Jury on the question of movement and operation of the train, on the ground that such negligence, if any, in the performance of such a duty was not the proximate cause in whole or in part of the decedent's injuries, said (R. 69):

> "We reach this conclusion on the basis that the decedent Thomas, gave no signal which could have been relayed by McCravy at the switch to the engineer Brewer. * * *"

If the Court meant by this statement that McCravy, at the switch 180 feet away from Thomas and 30 feet behind Brewer, could not have relayed a signal to Brewer, the Petitioner agrees this is a correct statement, because no one testified that in normal railroad operation, a signal could be properly relayed by shouting to a fireman operating a steam engine, who was not expecting a signal from an employee behind him.

The Court, in support of its conclusion, said (R. 69):

> "* * * McCravy said over and over again in his testimony that he kept Thomas in his sight at all times. The curvature of the track did not affect his vision, for he stated that he stepped back from the switch in order to keep Thomas in view.
>
> It is further suggested by the plaintiff that McCravy had only part of Thomas' body in view, but there is no proof at all that this was not enough to enable him to see any signal."

The mere repetition of a statement by McCravy, is not sufficient to preclude the Jury from disbelieving that part or all which they believe to be improbable. McCravy did not deny that the curvature of the track affected his vision, because, even though he stepped back from the track toward the ditch to avoid the obstruction of his vision by the bulge of the cars on the curve, still he only claims that no more than half of Thomas' body was perfectly visible to him (R. 30). It seems that McCravy was in the unen-

viable position of trying to show that, although he was not where he ordinarily would have been in the performance of his duties of relaying signals, his negligence in this respect did not cause or contribute to the accident. He knew that, from his position 180 feet away from Thomas, the box cars on the curve in the track would have obscured his vision of Thomas entirely, unless he moved back precariously close to the ditch, and, even then, it would have been partially obscured. The Jury could have readily found that he, McCravy adopted a "middle of the road course" by adhering to the story that he saw part of Thomas' body and, could have concluded that McCravy's reason for not keeping Thomas in sight was the same as Brewer's, who knew he would see Thomas shortly and since they were pushing two "order-notify cars which did not have to be spotted at a particular point, did not deem it important to watch him continuously for a signal, but that he, McCravy, didn't do anything but just threw the switch and kind of "relaxed" (R. 9).

The Jury might well have inferred that it would have been impossible for McCravy to have been looking and not have seen the things that happened in sequence before and/or after the pipe contacted the car, and, therefore, could have concluded he saw nothing until his attention was attracted to the accident by the *sound* of breaking or falling pipe, at which time, he looked up and saw the vertical portion vibrate; that had McCravy intended to comply with his duties of keeping Thomas in sight at all times, he could have done so by the simple expedient of walking a short distance or riding on the ladder of the car ahead of the engine, to the midway point, where he could have seen Thomas and have been in sight of Brewer, in order to be in his normal position to relay signals, visually.

The Court of Appeals refused to apply the same yardstick, as to the presumption of duty, that it used in refusing to hold Thomas guilty of contributory negligence as a matter of law, and, its refusal was based on the erroneous assumption that it had to accept as true the repetitious

testimony of McCravy that no signal was given. Granted the presumption, the Jury was free to believe either, that Thomas gave a signal which was unseen, for the reasons enumerated, or, as pointed out by the Court of Appeals, Thomas' attention was directed at seeing that the tracks were free of chocking blocks, and could have concluded that his duties would not have required him to see the pipe fouling the track, as a matter of law.

It is respectfully submitted, it was error for the Appellate Court to have ignored the fact that the Jury could have reasonably inferred Brewer's failure to stop when Thomas, giving signals, disappeared from sight, and/or McCravy's failure to be in his normal position to relay signals, was negligence, which caused or contributed to the happening of the accident. In *Tiller* v. *Atlantic Coast Line R. Co.*, Tiller, a railroad policeman, while inspecting seals on freight cars at night, was fatally injured when struck by cars being pushed by an engine. Unusual movement without warning was the claim of negligence. A directed verdict for the defendant was sustained on appeal (128 F. 2d 420), in an opinion which discussed "assumption of risk." This Court reversed (318 U. S. 54, 63 S. Ct. 444), leaving no doubt that "assumption of risk" was no defense in Federal Employer's Liability Act cases. On retrial, the plaintiff amended the complaint to include an alleged violation of the Boiler Inspection Act, by failure to have a proper back up light on the engine. A general verdict for the plaintiff was reversed on appeal (142 F. 2d 718, C. C. A. 4), holding there was no proximate cause —that the failure to have a back up light could have had nothing to do with the accident, since box cars were placed next to the engine and would have obscured its light; that since the trial court gave instructions to the jury on both issues (unusual movement and violation of the Boiler Inspection Act), the general verdict was set aside and the case remanded for a new trial, on the original issue of unusual movement. This Court granted certiorari, and, in reversing, 323 U. S. 579, 65 S. Ct. 421, said (pp. 578-79):

"Assuming, without deciding, that the railroad could consistently with Rule 131 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light did not contribute to Tiller's death. The deceased met his death on a dark night, and the diffused rays of a strong headlight, even though directly obscured from the front, *might* easily have spread themselves so that one standing within three car lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found (italics furnished).

E. The Reversal by the Court of Appeals of the Trial Court's Action in Submitting the Question of the Negligent Operation of This Train Movement, Is Contrary to the Applicable Decisions of This Court.

It is the Petitioner's belief that the Appellate Court's decision is contrary to this Court's decisions in the cases of *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598 (1947); *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409 (1944); *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421 (1945); *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949); *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 63 S. Ct. 1062 (1943).

In *Ellis* v. *Union Pac. R. Co., supra,* an employee was injured because of the close clearance of a building to the track, during a switching operation, where the view was obstructed by a building located near the middle of the curve. The employee was between the building and the track, to be in a central position "from which he could receive signals from the switchman and relay them to the engineer", the rule of the railroad requiring this. (See footnote 1 of opinion, p. 651, which states: "the engineer was required to have some member of the crew in sight at all times when the engine was in motion. At the time of the accident, the undisputed testimony indicated that the petitioner was the only member of the crew that the en-

gineer could see. The engineer testified that he watched the petitioner continously.") The employee was caught between the overhang of the car and the building. The railroad claimed that the building did not belong to them; that it had no control over it; that an addition was made on it which impeded the clearance; that the employee was at the only point where he could have been injured; that they maintained a sign eight feet above the ground reading "impaired clearance", etc. The Supreme Court held (p. 652):

> "• • • And the Jury might have thought that the engineer was negligent in failing to perceive the peril in time to avert the accident by a warning or by stoping the engine. • • • The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from the uncontroverted as well as the controverted facts, are questions for the Jury. • • •"

The Respondent took the position on appeal (Brief 39) that there was no duty on the part of McCravy to see the standpipe, and, that it was not proved from McCravy's position at the switch that he could actually see the horizontal part of the standpipe. If McCravy, from his position at the switch, could not see the standpipe it is certainly a reasonable inference that he could not see Thomas. Regardless of whether or not he could see the standpipe 180 feet away, *it certainly could not be disputed that had he been in his normal position to relay signals, he could have seen all of Thomas' body as well as the standpipe.*

In *Tennant* v. *Peoria & P. U. Ry. Co., supra,* Tennant was killed while engaged in switching operations. There was no direct evidence as to his precise location at the moment he was killed. The case was submitted to the jury on the allegation that his death resulted from the railroad's negligence, in that its engineer backed the engine and cars without first ringing the engine bell. The failure to ring the bell, which was not disputed, was alleged to be in vio-

lation of Rule 30 of the railroad's rules for its employees. This Court, in holding that the case should have been submitted to the Jury, said (p. 33):

> "* * * In view of respondent's own rule that a bell must be rung 'when an engine is about to move', it was not unreasonable for the jury to conclude that the failure to ring the bell under these circumstances constituted negligence."

In the case of *Lavender* v. *Kurn, supra,* Haney was killed while engaged in switching operations. He had been struck in the back of the head, causing a fractured skull. There were no eye-witnesses to the fatal blow. The conclusion following an autopsy was that his skull was fractured by some fast moving small round object. Petitioner's theory was that Haney was struck by the curled end or tip of a mail hook hanging down loosely on the outside of the mail car of the backing train. Respondent's theory was that Haney was murdered. This Court, in holding there was evidence from which it might be inferred that the end of the mail hook struck Haney on the back of the head, and, that the case was properly submitted to the Jury, said (p. 653):

> "* * * Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached, does a reversible error appear. * * *"

Moore v. *Chesapeake & O. Ry. Co.,* 340 U. S. 573, 71 S. Ct. 428 (1951), cited by the Respondent on appeal, is believed inapplicable.

The decedent, employed as a railroad brakeman, signalled the engineer to back out of a track with 33 cars. He stood on the footboard of the tender, which was the leading end of this move. The engineer, looking in the direction he was moving, said he could see part of the decedent's body,

and, saw him slump and fall toward the outside of the track, and, made an emergency stop in an unsuccessful attempt to avoid the accident. Petitioner alleged it was the engineer's sudden and unexpected stop, which threw the decedent from a position of safety into the path of the train. It was not disputed that there was only one stop. The engineer, the only witness called to testify, said he received no signal and had no reason to stop until he saw the decedent fall. There was evidence that the decedent had suffered heart attacks before and it was the Respondent's theory that he had one at the time of the accident. This Court, in affirming the Appellate Court's reversal of a verdict for the Petitioner, said (p. 577):

> "Hence, all the evidence shows is that the decedent fell before the train stopped * * *"

and that there was no evidence of any negligence—the only witness, the engineer, said he stopped only because the decedent fell, so, obviously, the stop could not have caused the fall.

While there could not even have been an inference of negligence in the *Moore* case, *supra*, in the present case, the testimony of McCravy that he was not in the position he would ordinarily have been to communicate signals and see what is going on, and, that of Brewer that he was shoving ahead blindly, is tantamount to an admission of negligence. Since the *Moore* case was not cited in the opinion of the Court of Appeals, it is presumed they also felt it was inapplicable.

In *Tennant* v. *Peoria & P. U. Ry. Co., supra*, this Court said (p. 35):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions,

> and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Especially compelling is this language in the present case, where the Appellate Court agrees that the case was properly submitted to the Jury on two of three propositions, and where the Respondent submitted no special issues to the jury. Should the Appellate Court's decision be allowed to remain, the Petitioner, a widow, after more than three years, would be compelled to try her case again, restricted to the issue of a safe place in which to work, and using as her witnesses, employees of the Respondent having an obvious self-interest.

VII. CONCLUSION.

Accordingly, for the reasons above set forth, that portion of the decision of the United States Court of Appeals for the Fourth Circuit, relating to the negligent operation and movement of the Respondent's train, should be reversed and the verdict of the Jury reinstated.

It is therefore respectfully submitted that the petition for certiorari be granted.

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Supreme Court of the United States

No. 475

PEARL E. THOMAS, ADMINISTRATRIX OF THE ESTATE OF CLYDE R. THOMAS, DECEASED,
Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI

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Supreme Court of the United States

No. 475

PEARL E. THOMAS, ADMINISTRATRIX OF THE ESTATE OF CLYDE R. THOMAS, DECEASED,
Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI

I.

STATUS OF THE CASE

This case was remanded to the District Court for a new trial. The complaint under the Federal Employers' Liability Act alleged failure to provide a safe place in which to work and an unsafe train movement. The Court of Appeals for the Fourth Circuit upheld the verdict of the jury on the first ground, but held that the second ground, that is, the unsafe train movement, should not have been submitted to the jury in view of the total absence of any evidence of negligence in the train movement. Inasmuch as there was a general verdict the case was remanded to be retried. 198 F. 2d 783.

II.

SUMMARY OF ARGUMENT

The prayer of the petition for certiorari should not be granted because:

1. The opinion of the Court of Appeals for the Fourth Circuit is not in conflict with the opinion of this Court in the cases mentioned on page 4 of Petitioner's brief, or any decision of this Court and, therefore, there is no conflict to be resolved in order to bring about uniformity of federal rights granted by a federal act, as stated in Petitioner's brief at page 4.

2. There was no evidence from which a reasonable inference could be drawn of negligence in the performance of any duty on the part of any employee of the railway company in the movement and operation of its train.

3. The petition shows that the matter presented to this Court is merely a request that this Court reappraise the evidence and raises no question of law or fact important to the Federal system.

III.

ARGUMENT

1. Petitioner cites six cases decided by this Court with which it is claimed the opinion of the Court of Appeals for the Fourth Circuit is in conflict. Petitioner's brief page 4. All of these cases were brought under the Federal Employers' Liability Act alleging a failure to provide a safe place to work. In all of the cases there was either direct conflicting evidence or proven facts from which more than one in-

ference could be drawn, which presented jury questions. The opinion of the Court of Appeals is in no sense in conflict with any of the cited cases for the reason that, as the Court of Appeals for the Fourth Circuit pointed out in its opinion, in the instant case:

> "From a careful consideration of all the evidence and testimony before the District Court, we cannot find anything which could support a reasonable inference that negligence, if any, in the performance of such a duty was the proximate cause in whole or in part of the decedent's injuries."

If there was a total lack of evidence of any negligence, then the District Court should not have permitted the jury to find a verdict based on any alleged negligence in the movement of the train.

An examination of the cited cases will show there is no conflict in the opinions in those cases and the opinion of the Court of Appeals.

Bailey v. *Central Vermont Railway,* 319 U. S. 350, 63 S. Ct. 1062 (1942).

This case was on certiorari to the Supreme Court of Vermont. This Court in a divided opinion reversed and held that there was sufficient evidence before the jury to uphold its verdict. The type of evidence in that case was:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground * * *".

For the Court, Mr. Justice Douglas stated that,

> "The debatable quality of that issue (safe place to work), the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury."

While Justices Roberts, Frankfurter and Stone considered that the case was not one even for review, the majority opinion held that the issues of fact, being disputed, were such that a jury should at least have had an opportunity of considering them.

Here the jury did consider the evidence, but the Court of Appeals held that it did not meet the degree of proof which would justify finding by a jury. Obviously, the opinion of the Court of Appeals is in no sense in conflict with *Bailey* v. *Central Vermont, supra.*

Ellis v. *Union Pacific,* 329 U. S. 649, 67 S. Ct. 598 (1947).

So, in this case, which was on a writ of certiorari to the Supreme Court of the State of Nebraska, there were conflicting versions as to how the accident happened and a question of credibility of witnesses. There appeared to be a clear question of fact for a jury to decide as to whether the signboard posted by the railroad company gave adequate warning of the close clearance and whether the engineer failed to warn the plaintiff of his precarious predicament between the track and a building near the curved track, which led to his injury, or whether he failed seasonably to stop his engine in time to avert the accident.

Mr. Justice Douglas said in the opinion:

> *"The choice of conflicting versions* of the way the accident happened, the decision as to which of the witnesses was telling the truth, the inferences to be drawn from the uncontroverted as well as the controverted facts, are

> questions for the jury * * * and where, as here, the case turns on *controverted facts* and the credibility of witnesses, the case is peculiarly one for the jury." (Italics supplied)

Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946).

This case was on a writ of certiorari to the Supreme Court of the State of Missouri. The Supreme Court of Missouri reversed a judgment entered in the court below for the plaintiff. The plaintiff's intestate was a switch tender and was found alongside the track, with evidence of a blow on the head which caused a fractured skull, from which he died. There was evidence that the place where the plaintiff had to work was unsafe and dangerous and that the light was insufficient and that in conjunction with these conditions the swinging mail crane arm on the moving mail car created a danger. The Supreme Court held that they were facts from which a jury could infer that there had been violations of the Act, because reasonable minds might differ as to the safety measures provided and, therefore, a jury's verdict must be upheld.

Obviously, in that case there was evidence from which a jury had a right to infer negligence. In the instant case there was not only no evidence that other employees failed to see and act upon a signal given by decedent, but the evidence establishes without conflict that decedent gave no signal. It follows that there could be no inference of negligence.

Tennant v. *Peoria*, 321 U. S. 29, 64 S. Ct. 409 (1944).

This case was tried on a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, which had reversed a judgment of the District Court in favor of the plaintiff. There plaintiff's intestate's death was caused, as alleged, by the failure of the engineer to ring the engine bell prior to backing the engine and cars northward out of Track

B-28, in violation of Rule 30 of the company's rules for employees. He was a member of the switching crew.

The question then became one of causation. Admittedly, the bell was not rung and it was for the jury to conclude what effect this violation of the rules had upon the accident. They had a right to conclude that the accident was caused wholly, or in part, by such negligence. This Court held that such conclusion was a reasonable one and, therefore, the jury's verdict must be upheld.

Tiller v. *Atlantic Coast Line,* 323 U. S. 574, 65 S. Ct. 421 (1945).

This case was on a writ to the Circuit Court of Appeals for the Fourth Circuit. As amended, the complaint included alleged violation of the Federal Boiler Inspection Act. This Court reversed the Court of Appeals and reinstated the judgment of the District Court in favor of the plaintiff.

This case, like the others, *contained substantial evidence* of *negligence.* There was evidence of unusual and unexpected back-up movement,—a departure from the general practice and the plaintiff's intestate had no reasonable cause to believe that such movement would be made and was not warned. There was undisputed evidence that the locomotive which pushed backward the string of cars,—one of which struck the deceased, was being operated in violation of one of the rules of the Interstate Commerce Commission requiring a headlight on the rear of the locomotive in the back-up movement. These were undisputed facts from which a jury could draw reasonable conclusions of causation.

Wilkerson v. *McCarthy,* 336 U. S. 53, 69 S. Ct. 413 (1949).

Here again there was conflicting evidence on the question of whether the employees habitually continued to use a board walkway over a narrow pit in the defendant's railroad coach yard after the railroad company had attempted to stop such

use by putting up a safety chain. It was ried on a writ of certiorari to the Supreme Court of Utah There was evidence both ways,—that employees generally did not use the walkway and that they did use it. Resolving this important, but controversial fact in favor of the plaintiff, the jury's verdict was final.

Mr. Justice Frankfurter took the position that certiorari should not have been granted since the case turned merely on an appraisal of evidence and presented no issue of importance to federal jurisprudence. He was joined by Mr. Justice Burton.

2. The decedent Thomas was in charge of the train movement. He was the conductor and riding the leading end of the leading car. For the protection of the crew, including himself, he had the duties of keeping a lookout for anything that might be fouling the track and of signaling when to stop the cars. Brakeman McCravy threw the switch for the backing movement into 33rd Street siding. Decedent, Thomas, was thoroughly familiar with the curvature of the track as he had been in charge of similar movements for many years. He knew McCravy was at the switch point because he spoke to him as he passed him, advising that he would set off the two order-notify cars in the siding, but not spot them for unloading. Due to the curvature of the track, for a matter of a few seconds, Thomas was out of the direct view of the engineer. However, it is undenied in this record that Thomas was at all times in view of McCravy and that McCravy was at all times in position to see and instantly inform the engineer of any signal decedent might give. It is uncontradicted that Thomas never gave a signal. McCravy watched Thomas the entire time, from the moment he passed him at the switch point until he saw the vibration of the standpipe and his body fall from the side of the car. These are McCravy's statements:

(Record 9):

"I stepped back to the switch in order to keep a complete line of vision on it."

"As he approached around the standpipe, I saw the standpipe vibrate, and the man came off the car" * * *

(Record 11):

"(I) stepped back two or three steps from the switch."

(Record 11):

"To keep in sight of Mr. Thomas".

" * * * He was shoving gradually around this curve. His body was going out of sight of me. That is why I stepped back from the switch from time to time."

(Record 30):

Q. When you saw the vertical rod quivering and Thomas simultaneously going down?

A. Yes, sir.

Q. Did you keep in sight of Thomas the entire time?

A. Yes, sir.

Q. How much of him could you see?

A. Well, right up to the point of the accident * * * oh, I would say about half of his body was perfectly visible, not more than that, from me.

Q. Did he ever give a signal to stop, or any kind of signal to the engineer?

A. No, sir.

Q. If he had, could you have seen it?

A. Yes, sir. He would have to put his arm out to give a signal, and that would put his arm several feet (inches) beyond his body and I could have seen it.

Q. You could already see part of his body?

A. I could already see part of his body, yes, sir.

(Record 32):

"A. * * * that was my reason for stepping back from the switch—in order to keep in view of him at all times."

An effort was made by counsel for petitioner in the Court of Appeals, and now here, to make much of the fact that McCravy remained in the area of the switch. It is contended that if he, McCravy, had taken a position *between* Thomas and the engineer, that he could have better relayed a signal. Such argument is fallacious for two reasons. *First,* there was no rule requiring McCravy to keep between the engineer and the conductor on the leading car in a switching movement of this kind, and no reason why he should have done so; and, *second,* even if he had been in such position the results would have been no different. If decedent had given a signal McCravy could and would have seen it from his position near the switch and could and would have informed the engineer instantly. In fact, when decedent's fall created cause for stopping the locomotive McCravy did instantly inform the engineer and he acted instantly upon that information and stopped the locomotive. Indeed he acted so promptly that the lead end of the car decedent had been riding came to a complete stop only half a car length—20 feet—beyond the stand pipe. That was impossible without instantaneous action by both McCravy and the engineer. It was, in any event, immaterial whether McCravy was in a position to relay a stop signal to the engineer by visual signal (as well as by mouth); for decedent gave no signal. The record in this case is definite, complete and final *that no signal was ever given by Thomas.* As the Court of Appeals said in its opinion:

> "But the simple act of disregarding evidence of no signal does not thereby create proof that one was given. There is not a scintilla of evidence in the record that any signal was made by Thomas."

To the same effect see *Moore, Admx.* v. *C. & O. Ry. Co.,* 340 U. S. 573. In that case a brakeman riding the front foot-

board of a slow moving yard engine fell and was run over. The engineer testified, without contradiction on any material point, that decedent's arm and a part of his shoulder projecting beyond the side of the coal tender remained continuously in his sight, that decedent gave no stop or other signal, that he saw decedent slump down and then fall from the footboard, and that thereupon he stopped the engine as soon as possible. The plaintiff argued in that case that the jury had a right to disbelieve the engineer's testimony and to find that the sudden stopping of the engine threw the decedent from the footboard rather than that the stop was made because he had fallen. This Court said, at page 576:

> "But disbelief of the engineer's testimony would not supply a want of proof. Bunt v. Sierra Butte Gold Mining Co., 138 U. S. 483, 485. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it."

Again, at page 577, the Court said:

> "Hence, all the evidence shows is that decedent fell before the train stopped. If one does not believe the engineer's testimony that he stopped after—indeed, because of—the fall, then there is no evidence as to when decedent fell. There would still be a failure of proof."

In the instant case, the significant facts parallel those in the *Moore* case in a striking manner. Thomas, the decedent, like the decedent in the *Moore* case, was riding the front end on a slow yard movement; brakeman McCravy, the sole eye witness, like the sole eye witness in the *Moore* case, owed a duty to keep decedent continuously in view for the purpose of receiving any signal he might give; and this sole eye witness, as in the *Moore* case, testified that he did keep decedent continuously in view, that decedent gave no signal whatever,

and that he saw decedent fall from the car. In each case the movement was stopped as soon as possible. Petitioner in each case alleged a failure of the sole eye witness to keep decedent in view. Here again, as in the *Moore* case, it is claimed that the jury should have been permitted to disregard the uncontradicted and unimpeached testimony of the sole eye witness (which was that he did keep the decedent continuously in view and that decedent gave no signal), and to find that there was a failure to keep decedent in view and to watch for signals. We quote again from the *Moore* case, at page 577:

> "To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. Galloway v. United States, 319 U. S. 372, 395."

That language could most appropriately be applied to the facts in the instant case. Even if brakeman McCravy's uncontradicted and unimpeached testimony were disregarded, it would not be permissible for a jury to infer from no evidence at all that, contrary to all good railroading practice, McCravy failed to keep Mr. Thomas continuously in view and to keep on the alert for signals from him. Such an inference is wholly unsupportable in the absence of any evidence either that decedent passed from McCravy's view or that he gave no signal. To permit the jury to so find would indeed be "speculation run riot" and would be permitting speculation to supply the place of proof.

When McCravy saw the vibration of the standpipe and Thomas falling off the car, McCravy was not over 30 feet from the engineer and immediately hollered to him, and, as the engineer testified:

"As I turned my head, I made an application of the brake valve and stopped, all the same time that I looked around." (R. 21)

The engineer further testified (R. 21):

Q. And when he shouted to you, you turned around?

A. And shut the throttle off, and made an application of the brake valve at the same time.

Q. All at the same time?

A. Yes, sir, just as fast as I could.

Q. And you stopped in what distance after Mr. McCravy shouted to you?

A. About half a car length.

Q. Mr. McCravy was how far back of you?

A. Oh, 300 (sic) feet, something like that; just a little ways back; I don't know—not too far back. (The reporter's transcript of "300 feet" is a typographical error as the witness said "30 feet.")

The context of the evidence is clear on this point. The switch near which McCravy remained was 180 feet west of the standpipe where the accident occurred and the engineer was two car lengths plus the length of the boiler west of the standpipe, which places him approximately 30 feet from McCravy. Upon such evidence the jury could not find that Thomas gave a signal and they could not find that Thomas was not at all times in the direct line of vision of McCravy. He testified to it, and the photographs showed it, as well as the sketch in evidence. They could not find any negligence in the stopping of the train, which was done in less than half a car length. In any event, the accident had already happened because the stopping of the train was due to McCravy's hollering as he saw Thomas fall from the car.

This Court said in *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32:

> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The *essential requirement is that mere speculation be not allowed to do duty for probative facts,* after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' " (Italics supplied)

Even if the jury could infer from anything that McCravy said or did, that his testimony was false, nevertheless, that would not permit the jury arbitrarily to fill up a void in the testimony and say that a signal was given. This is the essential difference between the record in this case and the cases cited by counsel for petitioner. In this case there simply was no evidence of negligence and no fact proved from which negligence in the operation of the train could be inferred.

The positive testimony of McCravy cannot be disregarded. As this Court said in *Penna. R. Co.* v. *Chamberlain, Admrx.*, 288 U. S. 333, 340:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

And in *C. & O. Ry. Co.* v. *Martin*, 283 U. S. 209, this Court reviewed the authorities on the point and quoted with approval from numerous cases, of which the following excerpts are illustrative:

> "Where, however, the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness." (P. 218)

and

> "The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to his testimony." (P. 218)

and

> "A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. The testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious, before a peremptory instruction upon the evidence can be said to constitute an invasion of the right of trial by jury." (P. 219)

To the same effect see Wigmore on Evidence, 3d Ed., Vol. 9, pp. 306 to 310.

In any event, disregard of McCravy's testimony would not help the petitioner, since it would not supply the lack of proof that Thomas gave a signal and McCravy failed to see it. *Moore* v. *C. & O., supra.*

The statement by counsel on page 19 that the fact that

Thomas was where he was supposed to be in the performance of his duties gives rise to presumption that he observed the standpipe fouling the track and gave a stop signal cannot be supported. The presumption that in performing one's duties he exercised due care for his own safety cannot be indulged when there is positive testimony that he did not.

New York Life Ins. Co. v. *Gamer*, 303 U. S. 161,
Del Vecchio v. *Bowers*, 296 U. S. 280,
Looney v. *Metropolitan R. R. Co.*, 200 U. S. 480, 488.

In the *Del Vecchio* case, in discussing the function of a presumption (in that case the presumption that a man will not commit suicide), this Court said (P. 286):

> "Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence."

Therefore the statement of counsel for petitioner on pages 19 and 20 that the jury could have reasonably inferred any one of the four propositions stated on page 20 is not correct:

1. The jury could not assume that Thomas saw a part of the standpipe fouling the track, and gave a signal in the face of positive evidence that no signal was given.
2. The jury could not assume that Thomas gave a stop signal which was seen by McCravy, but too late to avoid the accident, because McCravy was not in a normal position to relay a signal. The full evidence was that no signal was given and the record shows that McCravy kept Thomas in view at all times. His position relative to the engineer is wholly unimportant because

the physical facts show that the engineer responded immediately to McCravy's hollering to stop.

3. The jury could not infer that if Brewer had stopped the train when Thomas disappeared from sight the accident would have been avoided. There was no duty on the engineer to stop when his brakeman was on the ground in full view of Thomas.

4. The jury could well assume that Thomas did not see the horizontal part of the standpipe fouling the track, as counsel suggests. However, it is pure speculation to say that the jury could assume that "had McCravy been where he ordinarily would have been to relay signals and see what is going on, he would have seen it and could have stopped Brewer immediately, instead of shouting behind him."

   In the first place, there was no particular place for McCravy to be in this movement. He was at the switch and Thomas was in full charge of the train. McCravy was in a position at all times to receive Thomas' signals, and in a position to relay them to the engineer. There was no duty on him to see the cross-arm fouling the track and there is no proof that he could have seen it due to the position of the cross-arm. Thomas was on the leading end of the leading car for the express purpose of seeing that the track was clear and of giving signal to stop when proper. McCravy was entitled to rely upon Thomas to perform that duty and his sole duty after throwing the switch was to watch Thomas for signals and inform the engineer of any signal Thomas might give.

Counsel state that the Court of Appeals did not, in its opinion, give consideration to these "probabilities". It is submitted that the Court of Appeals did just that. It stated in its opinion:

> "The plaintiff attempted at the trial to show that McCravy was not always where he could see Thomas and

hence might have missed a signal, but we do not think that even an inference to that effect has been established. McCravy said over and over again in his testimony that he kept Thomas in his sight at all times."

The Court of Appeals further said, in contradiction of counsel's statement:

"We cannot find anything which could support a reasonable inference that negligence, if any, in the performance of such a duty was the proximate cause in whole or in part of decedent's injuries."

The Court of Appeals further stated in its opinion, in contradiction of counsel's statement:

"The plaintiff contends that McCravy should have been between the engineer, Brewer, and Thomas, so that Brewer could have seen any signals that McCravy might have relayed from Thomas without having to turn his head. The plaintiff further argues that the engineer not only had to turn around but, because of the noise of the steam engine, McCravy had to shout when he finally did give a stop signal upon seeing Thomas fall. *But such careless conduct had no causative effect upon the injuries here. If no signal was given, the inference that it might have been relayed negligently is wholly irrelevant.*

Moreover, it is quite evident that, once the stop signal was shouted by McCravy, the *engineer instantaneously braked the train* and everything possible was done to alleviate the situation." (Italics supplied)

3. This case, of course, has been tried by a jury. Because of error in instructions of the trial judge, the Court of Appeals has sent it back for a retrial by a jury. This Court is asked to appraise the evidence on one phase of the case which the Court of Appeals has declared to be insufficient

as it was presented to that Court. Even if this Court should consider that the evidence was sufficient no federal question is presented such that should engage the attention of this Court. The law under which the Federal Employers' Liability Act has been administered is plainly set forth and has been interpreted many times. The plaintiff has had a trial by jury and will have another one. Even if the Court of Appeals had rendered final judgment there would have been no reason for certiorari in this case, but there is no final judgment. The evidence that will be submitted in a new trial may or may not be the same as in the former trial. A pronouncement by this Court that the evidence on the phase of the case dealing with the operation of respondent's train was sufficient, could serve no purpose except to say that the Court of Appeals was wrong. On a retrial the evidence can be different, weaker, or stronger from the point of view of the plaintiff.

What was said by Mr. Justice Roberts in *Bailey* v. *Vermont*, 319 U. S. 350, *supra*, is certainly applicable here:

> "I am of opinion that this case is one of a type not intended by Congress to be brought to this court for review. Actions under the Federal Employers' Liability Act constitute but one category of the great total of actions triable in Federal District Courts and in the courts of the forty-eight states which may come to this court. While the legal principles binding alike on court and jury in such actions are, for the most part, settled, the complexes of fact to which these principles are applicable rarely are identical in any two litigations. If, in every case where, peradventure, this court might differ from a lower court in appraising the legal effect of the proofs adduced by plaintiff or defendant, we independently review the facts to determine whether there was evidence for a jury's consideration, we shall reverse a course founded in over fifty years of history."

Chief Justice Taft, speaking for a unanimous court in *Layne & B. Corporation* v. *Western Well Works*, 261 U. S. 387, 393, 43 S. Ct. 422, said:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

And Mr. Justice Frankfurter in a concurring opinion to *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949) said in reference to granting writs of certiorari in cases of this sort:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. The division in this Court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances. For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in fallible application of an archaic system of compensation for injuries to railroad employees may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control

the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough. It has been our practice to dismiss a writ of certiorari even after it was granted where argument exposed a want of conflict or revealed that the case involved no more than its particular facts."

IV.

CONCLUSION

For the reasons above set forth, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed and the petition for certiorari should be denied.

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